No. 09-812

IN THE

Supreme Court of the United States

LILIAN S. ILETO,
Petitioner,

v.

GLOCK, INC., RSR MANAGEMENT CORP.,
RSR GROUP NEVADA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Respondents' briefs in opposition all but confirm the circuit conflict and judicial disarray over the scope of the Protection of Lawful Commerce in Arms Act ("PLCAA") that require this Court's review. Tellingly, the United States takes no position on the issue of statutory interpretation raised by the petition. Gov't Br. in Opp. n.1. Glock, Inc. and RSR (collectively "Glock") do address the issue, citing four cases interpreting the predicate exception (15 U.S.C. § 7903(5)(A)(iii)) at issue. Glock Br. in Opp. 8-14. But each of those cases construes the predicate exception differently. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008), cert.

denied, 129 S.Ct. 1579 (2009); *Ileto* v. *Glock*, Pet. App. 14a; *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008), cert. denied, 129 S. Ct. 1579 (2009); and *Smith & Wesson Corp.* v. *City of Gary*, 875 N.E.2d 422 (Ind. App. 2007) (transfer denied January 12, 2009). Those cases, moreover, do not merely adopt constructions different from each other. They almost uniformly adopt constructions that differ from the ones adopted by the trial court decisions they review. Pet. 13-21.

Indeed, the Second Circuit's decision in *Beretta* and the Ninth Circuit's decision below defy any effort at reconciliation. Under the Ninth Circuit's reading of the predicate exception, petitioner's claims are outside that exemption and subject to dismissal. Pet. App. 14a, 21a. Under the Second Circuit's *Beretta* decision, by contrast, claims such as petitioner's are within the exception. Rather than seek to reconcile those cases, Glock attempts to dismiss the Second Circuit's construction as *dicta*. Glock Br. in Opp. 12. That is patently mistaken: As explained below, the Second Circuit majority panel did not merely set forth its construction. It applied that construction to the case before it and, for good measure, twice referred to the relevant portion *as its holding*. The proper construction of the predicate exception, moreover, is important, recurring, and of forward-looking significance, as courts, litigants, and the States struggle to understand its scope and impact on state laws.[1]

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[1] In the months since the decision below, the Nation has witnessed more multiple shootings perpetrated by individuals who illegally obtained firearms through the distribution system challenged by petitioner as unlawful. See for example Ian Shapira, *Pentagon Shooter's Spiral From Early Promise to*

I. THE CIRCUITS ARE SQUARELY DIVIDED ON THE MEANING OF THE PREDICATE EXCEPTION

The proper construction of the PLCAA's predicate exception—which exempts suits alleging knowing violations of a state statute "applicable to the sale or marketing of firearms" from the PLCAA's preemptive scope—has divided the courts of appeals. Construing the relevant text, the Second Circuit's decision in *Beretta* held that the exception encompasses cases in which defendants are alleged to have knowingly violated state statutes (1) "that courts have applied to the sale and marketing of firearms" or (2) "that clearly can be said to *implicate the purchase and sale of firearms*." *Beretta*, 524 F.3d at 404 (emphasis added). Respondents nowhere deny that, under that construction, petitioner's claims fall within the exception and survive preemption. It is undisputed that courts "have applied" the statutes petitioner invokes here—Cal. Civ. Code § 1714(a) (negligence) and §§ 3479/3480 (public nuisance)—"to the sale and marketing of firearms." In *Ileto* v. *Glock*, 349 F.3d 1191, 1209, 1215-1216 (9th Cir. 2003) ("*Ileto I*"), cert. denied, 543 U.S. 1050 (2005), the Ninth Circuit itself did so, holding that those very statutes encompassed this petitioner's claims against Glock. Moreover, Cal. Civil Code § 1714(a) *specifies* that the "design, distri-

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Madness, WASH. POST, March 7, 2010, at A01; William Yardley, *Tacoma Suspect Said to Threaten to Shoot Officers*, N.Y. TIMES, Dec. 1, 2009, at 01. Whether gun violence victims may pursue claims like petitioner's will continue to arise. See *NAACP* v. *AcuSport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003) (finding defendant firearms industry members engage in distribution practices that facilitate illegal sales despite the availability of simple, low-cost measures to deter such sales).

bution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section." It is difficult to imagine how statutory language could more "clearly implicate the purchase and sale of firearms" within the meaning of *Beretta*.

In the decision below, by contrast, the Ninth Circuit adopted a narrower and irreconcilable construction of the exception and thereby excluded this case from its scope. A state statute can qualify as "applicable to" firearms sales and marketing within the meaning of the predicate exception, the Ninth Circuit held, only if it "at the very least" has "a direct connection with sales or manufacturing." Pet. App. 14a. The Ninth Circuit thus rejected the argument that a state statute with more general terms can fall within the predicate exception when a court (here the Ninth Circuit itself) has determined that it applies to the sale and marketing of firearms, or even when the statute by its terms clearly applies to those activities. That directly conflicts with *Beretta*.

Confronted with an unmistakable conflict, Glock attempts to brush it aside by calling the Second Circuit's holding "*dicta*." Glock Br. in Opp. 12. That characterization is specious, as *Beretta* itself makes clear. *Beretta* concerned whether New York City's public nuisance lawsuit, which claimed violations of the State's criminal nuisance statute, fell within the predicate exception. The Second Circuit concluded that a statute of general applicability like New York's criminal nuisance statute could qualify as a statute "applicable to the sale or marketing of firearms" within the meaning of the predicate exception, but observed that no court had previously applied New York's criminal nuisance statute to firearms sales

and marketing. 524 F.3d at 399-400. The Court went on to analyze the scope of the exception, ultimately concluding:

> In sum, *we hold* that the exception created by 15 U.S.C. § 7903(5)(A)(iii): (1) does not encompass New York Penal Law § 240.45; (2) *does encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms;* and (3) does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.

524 F.3d at 404 (emphasis added). In a footnote, the opinion expressed "puzzle[ment] as to how our dissenting colleague can find this *brief and straightforward holding* insufficient" to provide future courts with guidance when applying the predicate exception. *Id.* at 404 n.5 (emphasis added).

The conflict between the Ninth and Second Circuits, however, represents the tip of an iceberg. Glock concedes that *Gary*, 875 N.E.2d at 431-435, arrived at yet another interpretation of the predicate exception. It held that Indiana's public nuisance statute, a statute of general applicability, qualifies for the exception. *Id.* at 431. The *Gary* court found the operative phrase—"statute applicable to" firearms sales and marketing—means a statute "*capable* of being applied" to firearms sales and marketing. *Ibid.* The *Gary* court concluded that Indiana's public nuisance statute plainly qualifies as such a statute because, before the PLCAA's enactment, the Indiana Supreme Court had squarely held the public nuisance statute applies to the sale and marketing of firearms. *Ibid.*

Glock does not deny that that interpretation of the exception is inconsistent with the Ninth Circuit's construction. Instead, Glock argues that *Gary* is not a sufficient basis for review under this Court's Rule 10(a) because it was decided by an intermediate state court of appeals. Glock misses the point. There is a square conflict between the Second and Ninth Circuits that, by itself, warrants review: There is no reason why otherwise identically situated litigants should be subjected to different constructions of a single federal statute based on the happenstance of where they reside. The fact that the conflict runs deeper still, encompassing intermediate state appellate courts and innumerable trial courts across the country, merely underscores "the widespread importance of the question involved and the confusing and different judicial responses to th[e] question." Gressman et al., *Supreme Court Practice* 256-257 (9th ed. 2007). Simply put, "the degree of diverse and conflicting views that lower courts," and the "contrary voices of district courts [that] obviously add to that confusion," underscore the issue's widespread importance. *Ibid.*

Glock's discussion of *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008), confirms the widespread judicial disarray. That case concerned a D.C. statute imposing *strict liability* on any manufacturer, importer or dealer of an assault weapon or machine gun for all damages arising from injury or death proximately caused by the discharge of such a weapon. The court concluded that, because D.C.'s Strict Liability Act or "SLA" requires compensation whenever such a weapon's discharge results in bodily harm, it imposes no duty on firearms manufacturers or sellers to operate in any particular manner or observe any standards of care. Liability under that

statute, the court of appeals therefore held, could not be reconciled with the PLCAA's predicate exception, which requires a "knowing violation" of a statute applicable to firearms sales and marketing. *Id.* at 169-170. The D.C. Court of Appeals thus construed the PLCAA and its predicate exception to preempt suits attempting to impose *strict liability*—not statutes (like those at issue here) that impose liability based on culpable violations. That the D.C. Court of Appeals adopted yet a different reading of the PLCAA underscores the need for this Court's intervention.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE PREDICATE EXCEPTION IS INCORRECT

By its terms, the predicate exception excludes from the PLCAA's preemptive scope suits that are based on "knowing violation[s]" of state statutes "applicable to the sale and marketing of firearms." The predicate exception does not refer to knowing violations of statutes *expressly* regulating firearms, or statutes *exclusively* regulating firearms (although that is how the District Court interpreted the exception below, Pet. App. 73a-115a, offering still another conflicting construction to an already dizzying array). The predicate exception also does not refer to knowing violations of statutes that clearly can be said to implicate firearms sales and marketing, as *Beretta* held, or to knowing violations of statutes that have a "direct connection" with sales or manufacturing of firearms, as held below. Instead, by its terms, the exception extends to statutes that are "applicable to" the sale and marketing of firearms. Because "applicable" means "applicable," the exception encompasses all statutes that apply to—that reach—the sale and mar-

keting of firearms. *Gary*, 875 N.E.2d at 430-435; *City of New York* v. *Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 262 (E.D.N.Y. 2005), overruled in part 524 F.3d 384 (2d Cir. 2008), cert. denied 129 S.Ct. 1579 (2009).

That construction is far more consonant with Congress's intent. The PLCAA was designed to preclude common-law liability "for the harm *solely* caused by the criminal or unlawful misuse of firearm products or ammunition products by others." 15 U.S.C. § 7901(b)(1) (emphasis added). Congress's use of the word "solely" demonstrates that Congress did not want gun manufacturers and sellers to be vicariously or strictly liable for the illegal use of their products by others. But it did not seek to exempt them from liability where the harm was *also* caused by their *own* misconduct (including their violation of statutory duties). That Congress did not intend the PLCAA to immunize the firearms industry from its own misconduct is also clear from the PLCAA's title. The statute is named the "Protection of *Lawful* Commerce in Arms Act," not the "Protection of *Illegal and Tortious* Commerce in Arms Act." See *Gary*, 875 N.E.2d at 433.

The PLCAA, moreover, reflects Congress's concern that state courts were trenching on the prerogatives of state legislatures by over-extending the common-law. But that concern is inapplicable where, as here, a statute has been violated and the state legislature has gone through the effort of specifying, in the statute itself, that the statute applies to firearms manufacture, sales, and marketing no less than any other activity. See Cal. Civil Code § 1714(a) (statutory requirement of "ordinary care or skill" applies to the "design, distribution, or marketing of firearms and ammunition"). That concern is also inapplicable

where, as here, the statute reflects a legislative choice to codify a less expansive cause of action than that recognized at common law, as occurred with California's public nuisance statute, Cal. Civ. Code §§ 3479/3480.[2] Both California's negligence and public nuisance statutes reflect considered legislative choices.

Finally, it is not true that the construction of the predicate exception urged by petitioner and applied in *Gary* would convert the predicate exception into an exemption that swallows the rule. 524 F.3d at 403. That ignores the fact that the PLCAA, by its terms, requires *knowing* conduct in every case (thereby precluding strict or vicarious liability). Pet. App. 56a-60a (Berzon J. dissenting).

III. THE NINTH CIRCUIT SHOULD HAVE CONSTRUED THE PLCAA TO AVOID SERIOUS CONSTITUTIONAL ISSUES

As the government points out in its brief in opposition, the Ninth Circuit chose not to invoke the doctrine of constitutional avoidance, theorizing "[t]hat doctrine does not apply where, as here, congressional intent is clear from the text and purpose of the statute." Gov't Br. in Opp. 5. However, as shown above and in the petition, congressional intent is not clear where, as here, opaque text has been interpreted so differently by so many courts. Moreover,

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[2] The definition of public nuisance codified by the California legislature in the 1872 Civil Code was *narrower* than the common law. For example, it excluded activities offensive to public morals, such as gambling houses. See *People* v. *Lim*, 18 Cal.2d 872 (1941) (holding that a gambling house is not a public nuisance under Civ. Code §§ 3479/3480 even though recognized as public nuisance at common law).

the Ninth Circuit and the Second Circuit both concluded the text of the predicate exception is ambiguous, and they arrived at radically different constructions. By contrast, the *Gary* court found the language of the exception to be *unambiguous*, but it adopted the most expansive view of the exception. The utility of the doctrine of constitutional avoidance here is thus beyond question. The statute is clearly ambiguous, and the courts of appeals cannot arrive at a single, coherent construction of its meaning.

Moreover, petitioner's important constitutional challenges merit this Court's review. The Ninth Circuit rejected those constitutional challenges primarily because it mistakenly believed that petitioner could pursue claims against China North, and thus was not left without any remedy; the United States repeats that mistaken conclusion. Gov't Br. in Opp. 9. But as petitioner has pointed out, Furrow did not use the China North rifle to kill petitioner's son Joseph Ileto. He used the illegally obtained Glock handgun. Pet. 3. As a result, and as *Ileto I* makes clear, petitioner has no claim against China North. See *Ileto I*, 349 F.3d at 1216 (reproduced Pet. App. 129a to 191a) (upholding dismissal of claims against firearms industry members whose firearms Furrow did not use, because the required causal connection between defendant's breach of duty and resulting harm cannot be shown if firearm at issue was not fired). And petitioner cannot sue Furrow for Glock's misconduct, but only for his own. In this case, the misconduct alleged is *Glock's misconduct in marketing its firearms to prohibited purchasers such as Furrow*.

The flatly mistaken assumption that petitioner can pursue other remedies against another firearms manufacturer pervades the government's position. For

example, the government does not address whether petitioner has been deprived of all potential remedies in violation of due process, assuming that she "may proceed with her claims against China North." Gov't Br. in Opp. 9. However, when understood as a complete bar to the state-provided adjudicatory process after petitioner had properly invoked that process, the PLCAA's similarity to the statutes struck down in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *United States* v. *Klein*, 80 U.S.(13 Wall.) 128 (1871), is evident. None of the cases relied on in the opposition briefs addresses a statute, like the PLCAA, which retroactively abolishes a category of accrued and pending claims based on statutes codifying the common law by stripping all courts of jurisdiction over those claims. Pet. 23-32. That characteristic of the PLCAA plainly raises serious constitutional questions. See *PruneYard Shopping Ctr.* v. *Robbins*, 447 U.S. 74, 93-94 (1980) (Marshall, J. concurring). Gov't Br. in Opp. 10 n.5.

Like the statutes struck down in *Logan* and *Klein*, the PLCAA is nothing more than the legislature's procedural device for dictating the outcome in pending claims. The PLCAA makes no change in any substantive element of the simple negligence or public nuisance statutes under which petitioner sued Glock. See Pet. 31-32 (explaining the differences between the PLCAA and the statute upheld in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992)). The PLCAA simply precludes all further federal and state court jurisdiction over her accrued and pending claims, merely because of who she has sued. But the identity of the defendant is not an element of a cause of action under these California statutes. Further, while Glock and the government assert that petitioner has no property right in her

accrued and asserted claim against Glock, they ignore the fact that state law is the starting point for determining whether there is a property right protected by the Constitution. Under state law (and under *Logan*), petitioner's accrued claims *are* protected property. Pet. 24-29. Finally, respondents simply have no answer to the profound consequences of their position: If their view were correct, the government could evade the Takings Clause and allow favored groups to steal the property of other citizens simply by, in the days following the theft, abrogating state causes of action for compensation. Pet. 31-32. That is not, and cannot be the law.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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